In the Supreme Court of the United States.

OCTOBER TERM, 1901.

MARY E. H. GWIN AND MIERS F. TRUETT, appellants, *v.* THE UNITED STATES. | No. 172.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA.

BRIEF ON BEHALF OF THE UNITED STATES.

Preliminarily, it is deemed proper to state historically the origin of the present controversy as gathered from this record and the opinion of the Supreme Court in the original case, *United States* v. *Peralta* (19 How., 343).

In 1820 the Mexican Government granted to Luis Peralta the Rancho San Antonio, a tract of land situate in what is now the State of California, and lying between the bay of San Francisco on the west and the Coast Range Mountains on the east.

The title to this grant having passed from Luis Peralta, the original grantee, by devise to his four sons, Domingo, Vicente, Antonio, and Ignacio, they, on January 21, 1852, presented their petition for confirmation of the grant to the board of land commissioners,

provided for in the act of March 3, 1851 (9 Stat. L., 631). Before any action was taken on the claim by the board a stipulation was filed by the claimants by which they divided their said lands among themselves, each taking a part extending from the mountains to the coast, Domingo taking the tract farthest north, Vicente the next on the south, Antonio the next, and Ignacio the other (R., 27).

On Augst 2, 1852, the board of land commissioners made an order that the names of Ignacio and Antonio be stricken from the petition at their request, and that their claim rest on the several petitions, Nos. 273 and 274, which they filed for the confirmation of the parts allotted to them, and that this be done without prejudice, and that the testimony in the original proceedings, so far as practicable, apply to all the said petitions (R., 5, 6).

Nothing appears to show whether or not Ignacio and Antonio ever prosecuted their claims under their separate petitions except the allegation in the present petition (R., 23, 24) "that the United States has issued patents to portions only of said grant as follows: To Antonio Peralta for sixteen thousand and sixty-seven and seventy-six one-hundredths acres; to Ignacio Peralta for nine thousand four hundred and sixteen and sixty-six one-hundredths acres; Domingo and Vicente Peralta for eighteen thousand eight hundred and forty-eight and ninety-eight one-hundredths acres; or, in all, forty-four thousand three hundred and thirty-three and forty one-hundredths acres."

The board of land commissioners, upon the hearing of the case, restricted the area of the grant by fixing the northern boundary line at a certain creek or stream called San Antonio, which included about one-half the claim. Both parties appealed from this decision, and the claim was certified, as provided in the act of 1851, to the United States district court for the northern district of California, and was there docketed as Land Case No. 100.

The district court, upon the trial, reversed the decree of the board of land commissioners, and declared the claim good and valid and entitled to confirmation, and entered its decree on January 26, 1855, in the following terms:

> That the claim presented in the petition filed in this case for the place called San Antonio is valid to the whole extent of its bounds, to wit, having for its northern boundary a line commencing on the bay of San Francisco at a point where there are close to the said bay the two cerritos, as described in the first possession given by Martinez to Louis Peralta on the 16th of August, 1820, running from the said bay eastwardly along by the southern (*northern*) base of the cerritos of San Antonio up a ravine, at the head of which there is a large rock or monument looking to the north, described in evidence as the Sugarloaf Rock; thence by the southern base of said rock to the comb or crest of the coast range of mountains or the sierra; thence for the western (*eastern*) boundary a line running along the comb of the

said sierra until it reaches the eastern extremity of a line beginning on the said bay of San Francisco, at the mouth of the deep creek of San Leandro, and running eastwardly up the said creek to its head or source in the sierra and to the comb or crest thereof, which last line is the southern boundary of the land of San Antonio, and by the said bay of San Francisco from the mouth of the said deep creek of San Leandro up to the beginning of the said line, which has been described as the northern boundary of said tract, which line along the bay constitutes its western boundary.

And it is hereby further adjudged, ordered, and decreed that there be confirmed to the said Domingo and Vicente Peralta the northern portion of said land of San Antonio, bounded as follows: On the north by the northern boundary of said tract of San Antonio, as above described; on the east by the comb of the said sierra; on the west by the bay of San Francisco, and on the south by a ravine a short distance south of the buildings in the town of Oakland, on the north of which ravine there is a small house in sight of the public road, being the line of division between this land and the land of Antonio Peralta, which line extends from the said bay to the most eastern boundary of the rancho of San Antonio (R., 6, 7).

From this decree the United States appealed to the Supreme Court, which court affirmed the decree of the district court. The present petition alleges that this appeal was on the sole question of the validity of the grant (R., 7), but the opinion of the court (*United States*

v. *Peralta*, 19 How., 343) discloses that two principal controversies were passed upon, it being claimed, first, that the officers issuing the grant documents had no power to make grants of lands; and, second, that the northern boundary of the land described did not extend beyond San Antonio Creek; both of which were decided in favor of the claimants.

This decision was handed down March 5, 1857, but nothing is disclosed as to when the mandate was issued and filed in the district court.

The next proceeding appears to have been upon the application of the acting United States attorney on August 30, 1859, when the district court ordered the surveyor-general to bring into court a plat of the survey of the said rancho of San Antonio (R., 11, 12), and in pursuance of this order the surveyor-general on November 2, 1859, returned into court a plat of the survey (R., 14).

On November 23, 1859, the acting United States attorney filed exceptions to this survey, which are set out in the record (p. 15).

Certain manifest clerical errors—the confusion of "southern" for "northern" and "western" for "eastern"—having been noted in the decree of January 26, 1855, were corrected by the court in an amendatory decree of November 30, 1859 (R., 8). This is the decree which the appellants now assert to be the "final" decree in this case within the meaning of the act of Congress of March 3, 1851, after the entry of which the court ceased to possess any further jurisdiction, and that all orders and decrees made and entered

thereafter were *coram non judice*, and that the action of the court upon the survey was totally void.

On December 3, 1859, the district court ordered the survey and plat to be returned to the surveyor-general for correction in conformity with the decree of November 30, 1859, the order stating that since the making of the survey, the original decree had been corrected of certain clerical errors, as was particularly shown in the order for that purpose entered December 1, 1859 (R., 15).

It appears that this survey referred to was a survey "of the northern part of the rancho of San Antonio finally confirmed to Vicente and Domingo Peralta" (R., 14).

Afterwards, on August 10, 1860, the surveyor-general returned into court a plat of survey purporting to be a corrected plat of the survey of said portion of the Rancho San Antonio as directed, of course, by the order of December 1, 1859 (R., 16).

On October 8, 1860, H. W. Carpentier et al. filed a petition of intervention, in which they claimed adversely so much land lying under the waters of that area of the Bay of San Francisco known as the estuary of San Antonio up to the highest tide lines, through mesne conveyances from the State of California (R., 16), and afterwards filed in court their exceptions and objections to the said survey, and the United States also filed its objections thereto (R., 16–17). The court, on November 22, 1862, sustained Carpentier's objections and exceptions to the survey, overruling those of the United States, and, on August 4, 1871, after various

objections, proceedings, orders, and surveys, which are set out in the record (17–21), finally approved the survey which fixes the lines of said grant "to run along the inner shore, excluding therefrom and from the lands confirmed the waters of the bay of San Francisco, and the arms thereof, and lands covered thereby, as far as the tides ordinarily flow at the full and change of the moon" (R., 17), so as to include all the land down to the ordinary high-water line (R., 18–20), and directed that in determining the line of ordinary high water, the line fixed by the officers of the United States Coast Survey as such be adopted, according to a plat of the same which was filed in the case (R., 20, 21) The record does not contain these various plats and surveys.

It appears that an appeal from this decree was taken by the United States to the circuit court for the ninth judicial district, but on July 31, 1874, the appeal was there dismissed (R., 22), the decree dismissing the same properly certified and entered in the district court (R., 22, 23), which ordered that the claimants have leave to proceed under the decree confirming the survey as under final decree (R., 23). In due time the Commissioner of the General Land Office caused to be prepared and recorded a patent of the United States for the lands included in the approved survey (R., 23).

A statement of the deraignment of the interest of the present petitioners and appellants in the lands in controversy is found in the record (R., pp. 9, 10).

Thirty-seven years after the entry of this "final" decree, and twenty-two years after the dismissal of the appeal in the circuit court, the next step in the matter

was taken. It appears that on September 2, 1896, the petitioner Gwin and one Francisco Sanjurjo, now deceased, presented to the Commissioner of the General Land Office (R., 10) a plat of the survey of the said rancho of San Antonio, made, approved, and certified by the surveyor-general of California on November 25, 1895, under the act of Congress of July 23, 1866 (14 Stats., 218), the eighth section of which said act provided that in the event no survey of the said confirmed grant had been, before the passage of said act, requested by said confirmees, nor had any such survey been requested within ten months after its passage, it was thereby made the duty of the surveyor-general for California, as soon as practicable thereafter, to cause the lines of the public surveys to be extended over such land, and to set off in full satisfaction of the grant the quantity of land confirmed in the said final decree and as nearly as could be done in conformity with such decree (R., 9). The petitioner Gwin also presented to the commission certified copies of the decree of November 30, 1859, and other papers, "with a request that he issue, or cause to be issued, to said claimants, confirmees Vicente Peralta and others, a patent for the lands of the rancho, in accordance with such plat of survey, in due form of law" (R., 10), which the Commissioner declined to do, the reasons for so doing being set forth in a letter of the Assistant Commissioner, which appears in the record (pp. 25–26). A reconsideration of the matter was had, and the request again refused in a letter of the Assistant Commissioner (R., 27–30).

The Secretary of the Interior was appealed to, but he likewise refused to issue the patent for the same reasons stated by the Assistant Commissioner (R., 11).

On July 27, 1899, the petitioner, Mary E. H. Gwin, by leave of court, filed in the district court of the United States for the northern district of California her petition of intervention in the case of *United States* v. *Peralta et al.* (R., 35). This petition substantially recited the proceedings had in reference to this grant before the board of land commissioners in 1852, the district court, the appeal to the Supreme Court, and the proceedings down to and including the "final" decree of November 30, 1859, but no court proceedings after that date were set forth; also the making of the plat by the surveyor-general under act of July 23, 1866, the request to the Commissioner of the General Land Office on September 2, 1896, that a patent be issued, his refusal, and the other proceedings in the Interior Department, as heretofore related (R., 35–37), closing with the following prayer for relief (R., 37–38):

> Wherefore your petitioner prays that the decree of this court so made and entered in this proceeding on the 30th day of November, in the year 1859 (and filed December 1, 1859), may be ordered to be executed; that the United States may, by the order and judgment of this court, be directed and required to cause to be made, signed, and issued to the said claimants, confirmees, in the proceeding its patent in due form of law for the lands of the rancho of San Antonio, or for so much and such parts thereof

> as have not heretofore been patented to them or any of them, by a day to be fixed in such order and judgment, and that in default thereof the United States show cause before this court, at a time and place to be fixed in such order and judgment, why she has not so made, signed, and issued, or caused to be made, signed, and issued, such patent, etc.

The United States demurred to the petition on twelve different grounds (R., 38, 39), which demurrer brought to the attention of the court that other and further proceedings than those recited in the petition, which ended with the decree of November 30, 1859, had been had and were of record in the case, and referred particularly to the decree of October 4, 1871, as the final decree.

On January 29, 1900, Judge Hawley rendered a very comprehensive and thoughtful opinion (R., 35–52), dismissing the petition. Part of this opinion is devoted to a discussion of the effect of the demurrer filed by the United States, in view of the fact that the petition recited none of the proceedings and orders in the case after that of November 30, 1859, and entirely ignored the proceedings had in execution of that decree, the scrutiny, supervision, hearing of objections to, and repeated modification of the survey on the part of the district court, leading up to the decree of August 4, 1871, finally approving the survey, and afterwards the issuance of patent thereon by the proper authorities; the petitioners contending that, because of the demurrer, the court should not consider any facts what-

ever except those mentioned in the petition, the demurrer having admitted its allegations as stated. The United States insisted that this petition, being but a single proceeding or phase of the original suit, in which various proceedings and their consequent results had been had over a long period, the court was bound to take judicial notice of the whole record, its own orders and decrees in the original matter, regardless of whether or not they were set forth in the petition (R., 41, 42).

The court adopted the Government's views, and held that the decree of 1871, and not that of 1859, was the final decree in the case, and upon which alone the matter was in condition for issuance of patent by the Commissioner of the General Land Office, and that the patent having been issued to the confirmees upon the survey approved by the decree of October 4, 1871, the court had no power to order the issuance of another or further patent as prayed by the petitioner on the survey of November 25, 1895, made under the act of July 23, 1866; that the obligations resting upon the United States under the treaty concerning Spanish and Mexican grants are purely political in their nature, and are settled and discharged only in such manner and upon such terms as Congress may deem expedient; and this by the decrees of 1859 and 1871 having been regularly done in the tribunals which Congress had vested with certain of its own political prerogative in the shape of a jurisdiction and procedure thereunder, outlined and defined by the limitations it had prescribed in its various acts relating to the matter,

the entire matter is *res adjudicata*. The court sustained the demurrer and dismissed the petition.

This opinion of Judge Hawley is one of the most thoughtful and learned that I have ever encountered, and any attempt to brief it in this statement would be but a spoliation.

On March 29, 1900, the present appellants filed in the district court, in this cause, a properly served notice that it would move the court for a rule or order commanding the United States to issue or cause to be issued to the said claimants, confirmees, Antonia Peralta, Vicente Peralta, Ignacio Peralta, and Domingo Peralta, or to such of them as may be entitled thereto, a patent for the lands of the Rancho San Antonio, in conformity with the survey (of 1895) now on file in the Department of Interior, in execution of the decree of 1859 (R., 31), or of so much and such portions of the said lands as have not been already patented to them or any of them, etc., and that such motion would be founded on the petition annexed.

This new petition (R., 1–31) substantially recites the record and proceedings in the original land case, No 100, as they have heretofore been stated, up to and including the application to the Commissioner of the General Land Office, requesting the issuance of patent on the survey of 1895 which had been executed and approved by the surveyor-general under the act of July 23, 1866, and also the action of the Interior Department declining to do so.

An elaborate demurrer, specifying fifteen grounds, was filed by the United States (R., 31–34), and on

May 28, 1900, the district court rendered an opinion dismissing the petition, a part of which is as follows (R., 34, 35):

> The petition of Mary E. H. Gwin, as intervenor herein, having been heretofore dismissed without prejudice, a new petition has been filed by her and one Miers F. Truett, asking the court to grant the same relief as was prayed for in the former petition. To this petition a demurrer has been interposed, upon the ground, among others in said demurrer specifically mentioned, "that the petition herein does not state facts sufficient to warrant or authorize the court in granting the relief prayed for."
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> The present petition is not subject to the objection made at the former hearing to the form of the pleadings, and that portion of the opinion which discusses that question may be said to be now eliminated from the case, because the present petition does set forth the steps that were taken and the orders and decrees that were made and rendered by the district court after the entry of the decree of November 30, 1859 (filed December 1, 1859), and states in detail certain facts concerning the plat of survey of November 25, 1895, made by the surveyor-general, upon which the petitioners rely, and the action of the officers of the General Land Office in regard thereto. It will thus be seen that there are many details in the facts set out in this petition that were not embodied in the former petition; but these additional facts simply present the questions herein involved more clearly and distinctly than before. The

> legal principles are precisely the same as were presented, discussed, and decided by this court in *United States* v. *Peralta*, 99 Fed., 618 (R. 35–52), and the views therein expressed are as applicable to this petition as to the former one. * * * The particular matter raised by the petitioner has long since become *res judicata*.

An order in accordance with this opinion was entered on July 30, 1900 (R., 53), and the matter is now before this court on appeal (R., 53–58).

BRIEF.

I.

JURISDICTION.

It is respectfully suggested that, this court is without jurisdiction of this cause and the appeal should be dismissed, for that, this action relates to the controverted execution of a decree of the district court of the United States for the northern district of California, in confirmation of a private land claim under the provisions of the private land claim act of March 3, 1851, entitled "An act to ascertain and settle the private land claims in the State of California" (9 Stat. L., 631), and acts amendatory thereof and supplemental thereto, to wit:

Section 12 of the appropriation act of August 31, 1852 (10 Stat. L., 99).

An act to amend an act entitled "An act to define and regulate the jurisdiction of the district courts of the United States in California, in regard to the survey

and location of confirmed private land claims," approved June 14, 1860 (12 Stat. L., 33).

"An act to expedite the settlement of titles to lands in the State of California," approved July 1, 1864 (13 Stat. L., 332).

By this latter act the right of appeal in such cases to the Supreme Court of the United States was withdrawn and prohibited thereafter, and the circuit court of the United States for California was vested with exclusive appellate jurisdiction.

The obligations resting upon the United States under the treaty of Guadalupe Hidalgo are purely political in their nature, and they may be performed or discharged by the political branch of the Government itself, or by some tribunal of its designation or creation, and upon such terms and conditions as it may impose. (*Ainsa* v. *New Mexico and Arizona R. R.*, 175 U. S., 76, 79.)

The designated or created tribunal may be clothed with final jurisdiction, or its actions may be subjected to such review by appeal as Congress shall in its wisdom declare. It may authorize appeal direct to the circuit court, the circuit court of appeals, or the Supreme Court of the United States, and may from time to time alter or change the tribunal to which appeals will be permitted, if to any.

This controversy does not involve the construction of the validity of the treaty of Guadalupe Hidalgo. It is within the competency of Congress to control the recognition of the obligations assumed under treaties,

especially those of an executory nature, and this prerogative will not be assumed by the judiciary unless invited by appropriate legislation, and then only in manner and to the extent requested.

The first act of Congress looking to the adjustment of the titles to lands within the territory ceded to the United States by the treaty of Guadalupe Hidalgo (1848) was passed March 3, 1851 (9 Stat. L., 631), entitled "An act to ascertain and settle the private land claims in the State of California," familiarly called the "California act," by which it was provided:

> SEC. 8. That each and every person claiming lands in California by virtue of any right or title derived from the Spanish or Mexican Government shall present the same to the said commissioners when sitting as a board, together with such documentary evidence and testimony of witnesses as the said claimant relies upon in support of such claims; and it shall be the duty of the commissioners, when the case is ready for hearing, to proceed promptly to examine the same upon such evidence, and upon the evidence produced in behalf of the United States, and to decide upon the validity of the said claim, and, within thirty days after such decision is rendered, to certify the same, with the reasons on which it is founded, to the district attorney of the United States in and for the district in which such decision shall be rendered.
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> SEC. 9. That in all cases of the rejection or confirmation of any claim by the board of commissioners it shall and may be lawful for the claimant or the district attorney, in behalf

of the United States, to present a petition to the district court of the district in which the land claimed is situated, praying the said court to review the decision of the said commissioners, and to decide on the validity of such claim, and such petition, if presented by the claimant, shall set forth fully the nature of the claim and the names of the original and present claimants, and shall contain a deraignment of the claimant's title, together with a transcript of the report of the board of commissioners, and of the documentary evidence and testimony of the witnesses on which it was founded; and such petition, if presented by the district attorney in behalf of the United States, shall be accompanied by a transcript of the report of the board of commissioners, and of the papers and evidence on which it was founded, and shall fully and distinctly set forth the grounds on which the said claim is alleged to be invalid, a copy of which petition, if the same shall be presented by a claimant, shall be served on the district attorney of the United States, and, if presented in behalf of the United States, shall be served on the claimant or his attorney; and the party upon whom such service shall be made shall be bound to answer the same within a time prescribed by the judge of the district court; and the answer of the claimant to such petition shall set forth fully the nature of the claim, and the names of the original and present claimants, and shall contain a deraignment of the claimant's title; and the answer of the district attorney in behalf of the United States

shall fully and distinctly set forth the grounds on which the said claim is alleged to be invalid, copies of which answers shall be served upon the adverse party thirty days before the meeting of the court, and thereupon, at the first term of the court thereafter, the said case shall stand for trial, unless, on cause shown, the same shall be continued by the court.

Section 10 provides for an appeal from the decree of the district court to the Supreme Court of the United States.

All proceedings for the adjustment and settlement of private land claims in California were required to be initiated before said board, and the proceedings were regulated by said act and the various acts of Congress thereafter passed amendatory thereto and supplemental thereof.

Section 13 of the act of 1851, defining the duties of the surveyor-general, is as follows:

SEC. 13. That all lands, the claims to which have been finally rejected by the commissioners in manner herein provided, or which shall be finally decided to be invalid by the district or Supreme Court, and all lands the claims to which shall not have been presented to the said commissioners within two years after the date of this act, shall be deemed, held, and considered as part of the public domain of the United States, and for all claims finally confirmed by the said commissioners, or by the said district or Supreme Court, a patent shall issue to the claimant upon his presenting to the General

Land Office an authentic certificate of such confirmation, and a plat or survey of the said land, duly certified and approved by the surveyor-general of California, whose duty it shall be to cause all private claims which shall be finally confirmed to be accurately surveyed, and to furnish plats of the same: and in the location of the said claims the said surveyor-general shall have the same power and authority as are conferred on the register of the land office and receiver of the public moneys of Louisiana by the sixth section of the act "to create the office of surveyor of the public lands for the State of Louisiana," approved third of March, one thousand eight hundred and thirty-one: provided always, that if the title of the claimant to such lands shall be contested by any other person, it shall and may be lawful for such person to present a petition to the district judge of the United States for the district in which the lands are situated, plainly and distinctly setting forth his title thereto, and praying the said judge to hear and determine the same, a copy of which petition shall be served upon the adverse party thirty days before the time appointed for hearing the same: and provided further, that it shall and may be lawful for the district judge of the United States, upon the hearing of such petition, to grant an injunction to restrain the party at whose instance the claim to the said lands has been confirmed from suing out a patent for the same until the title thereto shall have been finally decided, a copy of which order shall be transmitted to the Commissioner

> of the General Land Office, and thereupon no patent shall issue until such decision shall be made, or until sufficient time shall, in the opinion of the said judge, have been allowed for obtaining the same; and thereafter the said injunction shall be dissolved.

By section 12 of an act of August 31, 1852 (10 Stat. L., 99), the manner of perfecting appeals from the board of land commissioners to the district court was somewhat changed, and made more expeditious, but jurisdictionally the act of 1851 was in no way changed or modified, nor was withdrawn or affected the right of appeal to the Supreme Court of the United States given by the tenth section of the act of 1851.

Subsequently Congress passed another act, entitled "An act to amend an act entitled 'An act to define and regulate the jurisdiction of district courts of the United States in California in regard to the survey and location of confirmed private land claims,'" approved June 14, 1860 (12 Stat. L., 33). Prior to the passage of this act the question had been repeatedly raised that the entry of the original decree of confirmation by the district courts exhausted their jurisdiction over the claim, and that control of the execution of the decree by survey had never been given them. It was, however, held otherwise in the case of *United States* v. *Fossat* (21 How., 446) and the Fossat or Quicksilver Mine case (2 Wall., 649, 712, and 713). But whatever doubts may have existed, they were removed by the passage of the act of 1860.

The jurisdiction to supervise, control, and finally approve surveys was expressly given the district courts of the United States with the right of appeal to the Supreme Court. (*United States* v. *Halleck*, 1 Wall., 439.)

Subsequently, and in furtherance of the policy of expediting the final settlement of land titles in California, and to terminate as expeditiously as possible the litigation in various forms in the courts, and as well to relieve the Supreme Court of appellate jurisdiction upon questions of merely instrumentally locating upon the earth's surface the boundaries of grants defined in original decrees of confirmation, and which as a rule simply followed the act of juridical possession, Congress passed an act entitled "An act to expedite the settlement of titles to lands in the State of California," approved July 1, 1864 (13 Stat. L., 332).

Section 1 confers final jurisdiction upon the surveyor-general and the Commissioner of the General Land Office over the execution of decrees of confirmation made in compliance with section 13 of the act of 1851. It was the evident purpose of Congress to withdraw from the courts jurisdiction of the execution of these decrees of confirmation and delegate that duty to the land department of the Government.

This was, however, qualified by the subsequent sections of the act, as follows:

> SEC. 2. *And be it further enacted*, That the provisions of the preceding section shall apply to all surveys and plats by the surveyor-general

of California heretofore made, which have not already been approved by one of the district courts of the United States for California, or by the Commissioner of the General Land Office: *Provided*, That where proceedings for the correction or confirmation of a survey are pending on the passage of this act in one of the said district courts, it shall be lawful for such district court to proceed and complete its examination and determination of the matter, *and its decree thereon shall be subject to appeal to the circuit court of the United States for the district in like manner and with like effect as hereafter provided for appeals in other cases to the circuit court.* And such appeals may be in like manner disposed of by said circuit court.

SEC. 3. *And be it further enacted*, That where a plat and survey have already been approved or corrected by one of the district courts of the United States for California, and an appeal from the decree of approval or correction has already been taken to the Supreme Court of the United States, the said Supreme Court shall have jurisdiction to hear and determine the appeal. But where, from such decree of approval or correction, no appeal has been taken to the Supreme Court no appeal to that court shall be allowed, but an appeal may be taken within twelve months after this act shall take effect to the circuit court of the United States for California, and said circuit court shall proceed to fully determine the matter. The said circuit court shall have power to affirm, or reverse, or modify the action of the district court, or order the case back to the surveyor-general for a new survey.

> When the case is ordered back for a new survey the subsequent survey of the surveyor-general shall be under the supervision of the Commissioner of the General Land Office and not of the district or circuit court of the United States.

By the two sections quoted it is perfectly manifest that, subsequent to the taking effect of this act (1864), the Supreme Court was without appellate jurisdiction, unless the appeal had been taken at that date. Thereafter all appeals, which were permissible at all, were required to go to the circuit court, and so the law remained at least until the passage of the act of March 3, 1891 (26 Stat. L., 826), entitled "An act to establish the circuit court of appeals, and to define and regulate in certain cases the jurisdiction of courts of the United States, and for other purposes."

All appeals from the decrees of the district courts, relative to the settlement of the location and survey of private land claims under the acts of 1851, 1860, and 1864, were allowable, after the passage of this latter act, only to the circuit court.

Whether the act of 1891, establishing the circuit court of appeals, drew the appellate jurisdiction from the circuit court to that tribunal or not, still Congress has never since 1864 revived the right of appeal to the Supreme Court of the United States.

It is respectfully submitted that this appeal was improperly taken to the Supreme Court of the United States, and should, therefore, be dismissed.

II.

JURISDICTION OF THE DISTRICT COURT.

Conceding, *arguendo*, that all proceedings subsequent to the entry of the decree of November 30, 1859 (filed December 1, 1859), were *coram non judice*, and consequently are void, and such seems to be the position assumed by appellants, as disclosed by the petition, it follows that, after the passage of the act of July 1, 1864, the courts were deprived of all jurisdiction over the survey in execution of decrees of confirmation of private land claims, and that jurisdiction was transferred to the land department of the Government; therefore appellants' remedy lies in that department, with which the courts will not interfere, especially when the functions to be exercised by it are in their nature judicial.

Section 1 of that act is as follows:

> SECTION 1. That whenever the surveyor-general of California shall, in compliance with the thirteenth section of an act entitled "An act to ascertain and settle the private land claims in the State of California," approved March 3, 1851, have caused any private land claim to be surveyed and plat to be made thereof he shall give notice that the same has been done by a publication once a week for four consecutive weeks in two newspapers, one published in the city of San Francisco and one published near the land surveyed; and shall retain in his office for public inspection the survey and plat until ninety days from the date of the first publication in San Francisco shall have expired; and,

if no objections are made to said survey, he shall approve the same and transmit a copy of the survey and plat thereof to the Commissioner of the General Land Office at Washington for his examination and approval; but, if objections are made to said survey within the said ninety days by any party claiming to have an interest in the tract embraced by the survey, or in any part thereof, such objections shall be reduced to writing, stating distinctly the interest of the objector, and signed by him or his attorney and filed with the surveyor-general, together with such affidavits or other proofs as he may produce in support of the objections. At the expiration of said ninety days the surveyor-general shall transmit to the Commissioner of the General Land Office at Washington a copy of the survey and plat and objections and proof filed with him in support of the objections, and also any proof produced by the claimant and filed with him in support of the survey, together with his opinion thereon; and if the survey and plat are approved by the said Commissioner, he shall indorse thereon a certificate of his approval. If disproved by him, or if, in his opinion, the ends of justice would be subserved thereby, he may require a further report from the surveyor-general of California, touching the matters indicated by him, or proofs to be taken thereon, or may direct a new survey and plat to be made. Whenever the objections are disposed of, or the survey and plat are corrected, or a new survey or plat are made in conformity with his directions, he shall indorse upon the

> survey and plat adopted his certificate of approval. After the survey and plat have been, as hereinbefore provided, approved by the Commissioner of the General Land Office, it shall be the duty of the said Commissioner to cause a patent to issue to the claimant as soon as practicable after such approval.

By the eighth section of this act the act of June 14, 1860, and "all provisions of law inconsistent with this act," were expressly repealed.

Therefore, if, as alleged in the petition (R., 23), all the acts, orders, judgments, and decrees done and made subsequent to the entry of the decree of December 1, 1859, in respect of the survey of said grant were *coram non judice* and void, the act of 1864 remitted the entire matter to the land department, and the district court was without jurisdiction of this proceeding, and the appeal should be dismissed, or the judgment dismissing the petition affirmed.

If the petition be treated as an attempt to secure a mandatory order to compel the Commissioner of the General Land Office and the Secretary of the Interior to cause a patent to be prepared and recorded upon the survey made and approved by the surveyor-general of California on November 25, 1895, under the provisions of an act of Congress entitled "An act to quiet land titles in California," approved July 23, 1866 (14 Stats., 218), it is sufficient reply to say that, the act of July 23, 1866, was passed to compel an official survey of confirmed private land claims in which no steps had been taken either by the surveyor-general of California or

the confirmees to the lands confirmed, definitely separated from the public lands, and remove the cloud which extravagant claims under Spanish and Mexican grants had cast upon large areas, retarding their subjection to disposition under the land laws of the United States. Confirmed grants so circumstanced no longer remained under the jurisdiction of the district courts, but were remitted to the land department exclusively. (Sec. 8, act July 23, 1866.)

A mandatory order of the district court directed to the Commissioner of the General Land Office and Secretary of the Interior would be futile, for that no jurisdiction was ever given the district courts of California over the actions of these officials by any of the private land claim acts, nor have they under the judiciary act power to entertain jurisdiction of such an action.

III.

RES ADJUDICATA.

On August 30, 1859, upon application of the United States attorney, the surveyor-general was ordered to return into court the plat of the survey approved by him (R., 12).

On November 2, 1859, the surveyor-general, in obedience to said order, did return into court such approved plat of the survey of the northern portion of said claim, confirmed to Vicente and Domingo Peralta (R., 14).

On November 22, 1859, the United States attorney filed objections to said survey (R., 15).

On November 30, 1859, several clerical errors in the decree entered January 26, 1855, having been called to the attention of the court during the investigation of the survey, which had been returned into court upon the order theretofore made, the court ordered that decree amended, correcting the clerical errors, to wit:

> Ordered that the said decree (be), and the same hereby is, construed and amended by substituting the word "northern" for "southern" where the word southern the first time occurs in said decree, and the word "eastern" for "western" where the latter word first occurs in said decree. (R., 8.)

This order was entered December 1, 1859, and the decree, as corrected, was the decree upon which the survey was made, and is designated as the final decree of November 30, 1859, or of December 1, 1859.

On December 3, 1859, the court made an order that the survey theretofore returned into court be returned to the surveyor-general, in order that he might make the same conform to the decree as corrected by the order just mentioned, reserving to the parties entitled to be heard the right to except to the order of December 1, 1859, and the survey which might be made under it (R., 15).

Afterwards, on August 10, 1860, the surveyor-general returned into court a plat of the survey, purporting to be a correct plat thereof, of the northern portion of the rancho San Antonio, containing 19,143.86 acres (R., 16).

On October 8, 1860, Carpentier and others filed their petition of intervention in the case, under the provisions of the act of June 14, 1860, claiming part of the land included within the survey so returned on August 10, 1860, by title derived from the State of California (R., 16). Among the lands so granted by the State and owned by Carpentier et al. was so much of the land included within the survey as lies under the waters of that arm of the bay of San Francisco known as the estuary of San Antonio, and on the shores of said estuary of San Antonio up to the highest tide line, as situated on the northerly side of the middle line of said estuary, claiming that said lands were never included within the grant confirmed nor the decree of confirmation.

Thereafter, Carpentier et al. and the United States filed objections to the survey (R., 16–17), and on November 22, 1862, the district court made an order in the case modifying said survey and plat, that all the objections to said survey were overruled and the said survey approved and confirmed, except "as to the objections of the intervenors, Carpentier and others, to the including within said survey of the tide lands lying within the corporate limits of the city of Oakland; which said objections are hereby sustained, and so much of said official survey as lies within said corporate limits is hereby adjudged to be erroneous and ordered to be corrected and modified" (R., 17); and it was further ordered that the surveyor-general of the United States for California cause said survey and

location to be corrected and reformed, so as to conform to this decree, and to return the same to the court for its final confirmation and approval. Further directions were given also as to the manner of correcting the survey, and directing that the line should be modified so as to run along to the inner line of the shore, excluding therefrom and from the lands confirmed the waters of the Bay of San Francisco, and the arms thereof, and the lands covered thereby, as far as the tides ordinarily flow at the full and change of the moon. The order was duly served upon the surveyor-general by the United States marshal.

On November 26, 1866, on a motion to amend the order or interlocutory decree of November 22, 1862, so as to conform to the decision of the court directing a decree, it was ordered that the survey be modified between courses 93 and 113 so as to include all the land between said courses down to the ordinary high-water line, and exclude only so much land between said courses as is covered by the tides which happen between the full and change of the moon twice in twenty-four hours. All other exceptions were overruled and the survey in other respects approved, and the surveyor-general was directed to proceed without delay to cause the modifications to be made and return into court a certified plat of the survey, so modified, for its approval. (R., 18.)

Various proceedings were had, for the purpose of correcting the survey, until on August 4, 1871, when the court, after due notice had been given, adjudged

and decreed that the modified survey be approved as the true and correct location of the lands confirmed in said cause, the survey of confirmation containing 18,848.96 acres, and is the same executed under the direction of the court by decree entered in the cause on June 5, 1871 (R., 21).

Thereupon an appeal was sued out by the United States to the circuit court of the United States for the ninth judicial circuit (R., 21), which was, on stipulation, thereafter dismissed on July 31, 1874 (R., 22).

On the presentation of the certificate of dismissal, it was ordered that a copy of the decree be filed in the court, and that the claimants have leave to proceed under the decree therefore entered in the case, confirming the survey, as under final decree; and thereafter patent was issued to Domingo and Vicente Peralta, confirmees, for the northern portion of said grant (R., 23).

The foregoing proceedings, taken subsequent to the mandate of the Supreme Court, were regular and in conformity with the law, under the act of 1851, and the various acts amendatory thereof of 1860 and 1864, and as to Vicente and Domingo Peralta, and their privies, it was a final and complete settlement and determination of all their rights against the United States, especially the location of the shore of the bay, which was the particular question litigated and determined. The petitioner, Mary Gwin, claims title under Vicente Peralta, through mesne conveyances, as early as 1855 (R., 9, 10), and Miers F. Truett acquired his interest

by inheritance from his father, in 1878, who acquired his interest from Vicente Peralta, by mesne conveyances, in November, 1855 (R., 9, 10). The petitioners are therefore in such privity with Vicente Peralta that they are not strangers to the proceedings had and taken in the Supreme Court on appeal, and those subsequently taken in the district court relative to the execution of the decree of confirmation, and are bound by the actions of the court upon the survey and the final issue of patent, which inured to their benefit as the legal representatives, in part at least, of the claimants and confirmees. The jurisdiction of the court ceased upon the issue of patent.

It was perfectly competent for them to have come into the original case for the purpose of controlling the proceedings and protecting their interest: the private land claim acts provided for such intervention. But, aside from such express authority, having acquired an interest through the claimants, it would have been perfectly proper for them to have come in to protect their interests and to aid the other claimants, but in so doing they must accept the case as they find it and act conjointly. Having refrained from intervening for their own protection and permitting the jurisdiction to become exhausted by a final executed decree, and having accepted the benefits thereof for over twenty years without protest or excuse for their laches, all matters determined and which were necessary to be determined are *res adjudicata* as to the confirmees and their privies. The issue raised by the present pleadings is the survey

of the line called for in the decree as the "Bay of San Francisco," and it was determined and adjudged on June 5, 1871, that the line should include all the lands between said courses (93 and 113) down to the ordinary high-water line, and exclude only so much land between said courses as is covered by the tides which happen between the full and change of the moon, twice in twenty-four hours (R., 20); which was accordingly done, and the survey again returned into court and finally approved August 4, 1871 (R., 21). The lands excluded, therefore, by this survey and decree were those lying between high and low tide. This is the very question which the appellants are seeking to have the court redetermine adversely to its former adjudication, so that an additional patent may issue for the lands lying between high and low tide. The district court was jurisdictionally competent to determine this question, and its decree became final. The petitioners are now precluded from reopening the question. This principle was clearly announced by this court in *Southern Pacific R. R. Co.* v. *United States* (168 U. S., 48, 49), wherein the court reviews its adjudications on the subject of *res adjudicata*, and says:

> The general principle announced in numerous cases is that a right, question, or fact distinctly put in issue and directly determined by a court of competent jurisdiction, as a ground of recovery, can not be disputed in a subsequent suit between the same parties or their privies; and even if the second suit is for a different cause of action, the right, question, or

fact once so determined must, as between the same parties or their privies, be taken as conclusively established, so long as the judgment in the first suit remains unmodified. This general rule is demanded by the very object for which civil courts have been established, which is to secure the peace and repose of society by the settlement of matters capable of judicial determination. Its enforcement is essential to the maintenance of social order, for the aid of judicial tribunals would not be invoked for the vindication of rights of persons and property if, as between parties and their privies, conclusiveness did not attend the judgments of such tribunals in respect of all matters properly put in issue and actually determined by them.

IV.

PLEADINGS.

The final petition upon which the case comes to this court is in the nature of an amended petition presented after the opinion of Judge Hawley, filed January 29, 1900, upon the demurrer of the United States to the petition of Mary E. H. Gwin, rendered July 27, 1899. (R., 35–52.)

The opinion of Judge Hawley upon the demurrer to the amended petition of Gwin and Miers F. Truett (R., 34, 35) relieves the case of any serious difficulty, so far as the propriety of the form of pleadings is concerned.

If the petition be treated as an attempted intervention under the same right, the petitioners must accept

the case as they find it and submit to have the record in Land Case No. 100, *United States* v. *Vicente Peralta et al.*, judicially noticed in determining any question involved. It is immaterial what the pleading be called, the record is within the judicial notice of the court, and not subject to technical rules of pleading; and the demurrer might just as well be designated as suggestions on the record in opposition to entertaining the petitioners' application. Otherwise, the case must stand as an original suit, subjecting it to the jurisdictional objections heretofore considered.

All private land claim acts, and the procedure therein provided, have attempted to avoid technical rules of procedure by which the conclusion of the litigation can be delayed and the results thereof rendered questionable or ineffective.

A complete answer to the technical objections to the form of the pleadings on behalf of the United States is found in the case of *United States* v. *Fossat* (21 How., 446), wherein Mr. Justice Campbell, for the court, said:

> In the exercise of the jurisdiction conferred by this act (1851) and acts of a similar character, this court has habitually revised decrees of the district court which were not final decrees under the judiciary act of 1789. The court has uniformly accepted, in the first instance, as a final decree, one that ascertained the authenticity of the claimant's title, and declared, in general terms, its operation, leaving the questions of boundary and location to be settled subsequently. This practice was approved

in the case last cited (*Ex parte Sibbald* v. *United States*, 12 Pet., 488). The peculiar nature of these cases rendered such a relaxation of the rules of proceeding of the court appropriate. The United States did not appear in the courts as a contentious litigant; but as a great nation, acknowledging their obligation to recognize as valid every authentic title, and soliciting exact information to direct their executive Government to comply with that obligation.

They had instrumentalities adequate to the fulfillment of their engagements without delay whenever their existence was duly ascertained. There was no occasion for the strict rules of proceeding that experience has suggested to secure a speedy and exact administration between suitors of a different character; and it has rarely occurred that the same case has reappeared in the court after the first decree. If the litigation had been other than it was, the rule of proceeding would have varied with it.

The petition and demurrer spread before the court the entire record relative to the controversy. In this character of cases, and "in an investigation of this kind that court is not limited to the dry, technical rules of a court of law." (*Ely's Administrators* v. *United States*, 171 U. S., 220, 240.)

The act of Congress of March 3, 1891, establishing and defining the jurisdiction and procedure of the Court of Private Land Claims, is much more restrictive in all respects than any of the former private land-claim acts; yet neither that court nor the Supreme Court has ever permitted matters of form of procedure

to interfere with the liberal, effective, and just ascertainment and settlement of the rights of claimants to lands, and their speedy recognition and separation from the public domain by survey and patent.

The various acts of Congress referred to, of 1851, 1852, 1860, 1864, and 1866, develop a clear intent to bring the litigation to a termination and quiet the titles to lands in California. In the spirit of these acts the demurrer of the United States was the proper response to the so-called petition of intervention filed by Mary E. H. Gwin and Miers F. Truett on March 29, 1900.

Indeed, a general demurrer would have been sufficient to reach every question attempted to be raised by the special grounds assigned, and, as well, the great laches, for which no excuse is offered in the petition. The general rule, which has peculiar application to the allegations contained in the petition, is stated in 1 Bates on Federal Equity Procedure (par. 196, p. 260), as follows:

> If it appears upon the face of the bill that the plaintiff is chargeable with laches in the assertion of his rights, the defect may be taken advantage of by demurrer. Laches is a defense which may be made by demurrer or by plea, or by answer, or presented by argument, either upon a preliminary or final hearing, or the court may, upon its own motion, refuse to consider plaintiff's case, where it appears that he is chargeable with laches.

If it be contended that the execution of the decree of 1859, by the approval of the survey in 1871, was

only an execution *pro tanto*, to that extent, at least, is it *res adjudicata* as to these petitioners. As to the remaining portion of the grant, and the surveys thereof, if they have not been executed in accordance with law, relief must be sought in the land department of the Government. But it is anticipated from the allegations in the petition (R., 23, 24) that patents have been issued for the total area of the grant, and that the real purpose and intent of this proceeding is to obtain from the district court and this court a recognition of some unadjudicated and undetermined right belonging to these petitioners or the original confirmers, Domingo, Vincenti, Antonio, and Ignacio Peralta, to the land along the entire frontage of the grant on the bay of San Francisco between high and low tide. A sufficient answer to this is to say that, so far as the court has adjudicated the west line of this grant along the bay of San Francisco, it was fixed at the ordinary high-water line, as located by the officers of the United States Coast Survey, and, as repeatedly suggested herein, if anything remains to be done, the petitioners must be remitted to the land department of the Government.

Respectfully submitted.

JOHN K. RICHARDS,
Solicitor-General.

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No. 172.

Add'l Br. of Attorney General
(Richards & Reynolds) for U. S.

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In the Supreme Court of the United States.

OCTOBER TERM, 1901.

MARY E. H. GWIN AND MIERS F. TRUETT, appellants,
v.
THE UNITED STATES.
} No. 172.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA.

ADDITIONAL BRIEF FOR THE UNITED STATES.

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APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA.

ADDITIONAL BRIEF FOR THE UNITED STATES.

The remarkable liberty taken by counsel for appellants with the meager record in this case calls for some notice and reply on behalf of the United States, lest too much be deemed conceded.

The brief of appellants was not in the possession of counsel for the Government until after their original brief had been filed.

The real contention is stated as follows:

> Appellants are not complaining that a patent for the confirmed claim has been made to the wrong person. Their cause of complaint is that no patent for such claim has been made to any one. (Appellants' brief, p. 52.)

If this be true, then under the acts of Congress of July 1, 1864 (13 Stat., 332), and July 23, 1866 (14

Stat., 218), the district court for the northern district of California had no jurisdiction to grant the relief prayed.

It is perfectly manifest that the difficulty confronting appellants does not arise from the want of survey and patent under the original decree of confirmation entered December 1, 1859, but from the neglect on the part of the confirmees and their grantees to appeal from the decree of final approval of the survey in 1871, upon which the patent to Domingo and Vicente Peralta was issued in 1877. They had their day in court and failed to pursue the remedy by appeal, as provided by law they might if dissatisfied, and now, twenty-five years after, Gwin and Truett, claiming under Vicente Peralta, insist that all proceedings under the decree of 1859 were *coram non judice*, and consequently are void.

But is it correct to say that the decree has not been executed and, although holding under Vincente Peralta, appellants are in nowise bound by the actions of the court since 1859? Is the contention true that the mandate of the Supreme Court, issued upon the opinion of this court in case of *United States* v. *Vincente Peralta et al.* (19 How., 343), has not been obeyed?

Counsel evidently confuses the two jurisdictions of the district court, viz:

First. To determine the validity of the claim and the external boundaries of the grant, or the quantity to be thereafter located if afloat, and the interest of claimant therein.

Second. To supervise surveys made by the surveyor-general in execution of original decrees of confirmation, which had been entered by the district court on appeal from the board of commissioners, or which were brought before the court, under the provisions of the act of June 14, 1860, upon application of any party affected by such survey.

It was held in the *Fossat* or *Quicksilver Mine* case (2 Wall., 649–712) that the jurisdiction of the district court over surveys in execution of decrees entered by it could be exercised as an inherent power in the court to compel a correct execution of its decrees. But grave doubts were repeatedly suggested as to the propriety and legality of such control, and more especially the jurisdiction of the district court over surveys made in execution of decrees of the board of commissioners where no appeal had been prosecuted and no decree had been entered by that court upon which to predicate jurisdiction.

All doubts were, however, removed by the passage of the act of June 14, 1860 (12 Stat., 33). *United States* v. *Fossat* (21 How., 446), and *United States* v. *Halleck*, (1 Wall., 439–454).

The jurisdiction of the district court to supervise surveys made under decrees of the court or the board of commissioners, where no appeal has been prosecuted to the district court, was expressly conferred for the first time by the act of 1860, and was a jurisdiction distinct from that authorizing the original decree or confirmation.

In the case of *Higueras* v. *United States* (5 Wall., 827–833), it was held:

> Jurisdiction over the "right or title" of the claimant is conferred upon the commissioners, under the act entitled "An act to ascertain and settle private land claims," but the jurisdiction over the surveys of the same, after the plat is certified and approved by the surveyor-general, is conferred upon the district court under the subsequent act, and the two things are wholly distinct and can not be blended, nor can the one be substituted for the other.

No jurisdiction over surveys was ever conferred upon the board of commissioners.

The decree of the district court determined the validity of the entire grant and the external boundaries which was affirmed on appeal, as was also that part of the decree which specifically confirmed to Vicente and Domingo Peralta the northern portion of the grant, with the boundaries of such portion designated by natural objects in the decree (*United States* v. *Peralta*, 19 How., 343). So that the entry of the decree of December 1, 1859, was in complete obedience to the mandate; if not, an appeal should have been prosecuted within the time and manner provided by the act of 1851, upon the ground that the mandate had been disobeyed or misinterpreted. No appeal having been prosecuted from the decree entered in obedience to the mandate on December 1, 1859, or from the decree in 1871 approving the survey, neither are now open to question by the confirmees or their grantees.

That these appellants are grantees under one of the confirmees, Vicente Peralta, is disclosed by an allegation in the petition (R. 9) that—

> Your petitioners further show that they are interested in the lands of the said ranchoe under the *claimants and confirmees*, and that their respective title thereto was derived by mesne conveyances from the said confirmees.

Domingo, Vicente, Antonio, and Ignacio Peralta, the sons and devisees of Luis Peralta, the original grantee of the rancho San Antonio, on January 21, 1852, presented their joint petition under the act of 1851 to the board of commissioners for a confirmation of the claim, and the same was docketed by the board as case No. 4 (R., 5).

On August 2, 1852, the board made the following order (R., 5 and 6), viz:

> On motion of the counsel of Ignacio Peralta and Antonio Peralta, ordered that their names be stricken out from the petition No. 4 and their several claims rest on the several petitions, Nos. 273 and 274 on the docket of this board, for portions of the rancho San Antonio, and that this be done without prejudice, and that the testimony heretofore taken in No. 4 shall, so far as applicable, apply to all the said petitions.

Thereafter the claim was prosecuted before the board, district court, and the Supreme Court in the names of Vicente and Domingo Peralta for their interests in the grant.

The agreement or stipulation for partition of the grant between the four claimants, and under which

Antonio and Ignacio Peralta withdrew "without prejudice" from the joint petition No. 4 before the board of commissioners and under which they severally prosecuted their claims before said board as Nos. 273 and 274, does not appear in this record.

But it sufficiently appears in the proceedings that there was assigned to Domingo and Vicente Peralta the northern portion of the claim, and the boundaries thereof are set out in the decree of the district court entered on January 26, 1855 (R., 6 and 7), which was affirmed by the Supreme Court at the December term, 1856, and became, upon the mandate, the decree of December 1, 1859.

Attached to the brief on behalf of the appellants, as Exhibit G, is a copy of a portion of the patent issued to Antonio Peralta for his portion of the grant lying to the south of that portion assigned to Domingo and Vicente, but how counsel imports this into the record we are unable to say; but taking it at face value, it is evident the claim against the United States, so far as Antonio Peralta is concerned, has been fully satisfied and neither he nor those claiming under him have ever complained or protested that the patent so received was not a complete and full satisfaction of his claim under the Luis Peralta grant. That portion assigned to Ignacio Peralta, being the southern portion of the grant, was confirmed to him, surveyed and patented, and no complaint is forthcoming from him or those claiming under him that he has not received full satisfaction of his claim under the Luis Peralta grant.

The court found the grant to be valid and entitled to recognition to its full extent, and decreed confirmation specifically to Domingo and Vicente of their portion, which was affirmed by the Supreme Court.

It would probably have been the better practice to decline Antonio and Ignacio permission to withdraw from the original case No. 4, with leave to proceed upon their separate petition in cases Nos. 273 and 274 for their respective interests or tracts, as the board of commissioners had in the single case all claimants for the grant before it, and could have settled all rights in one suit But there is nothing in the statute discovered by the writer prohibiting such course if the parties in interest so agreed and the court consented. Their withdrawal could not affect the right of Domingo and Vicente to proceed with the case, establish the validity of the grant, and have their interest confirmed to them.

The interests asserted by appellants are not undivided in the entire grant, but undivided interests in that portion only which was allotted to Vicente and described in the petition (R., 9–10) as—

> All that portion of the said rancho lying south of a line running from a ravine or gully in the range of mountains of the Contra Costa south 63 degrees, west magnetic, to the shore of the bay of San Francisco, said line following the same direction to the center of Yerba Buena Island or Goat Island, and being the dividing line between the lands of Domingo Peralta and said Vicente Peralta; on the northeast by the

> said ridge of mountains of Contra Costa to a gulch or ravine called de la Audita; on the southeast by said ravine to the estuary of San Antonio; on the south and southwest the bay of San Francisco.

which was conveyed on August 2, 1853, by Vicente Peralta and wife to Richard P. Hammond, John C. Hays, John Caperton, and Lucien Herman. On November 10, 1855, Richard P. Hammond conveyed to Mary E. H. Gwin "twenty-five undivided one thousand and one parts of the same tract of land." On November 3, 1855, said Hammond conveyed to Henry B. Truett, ancestor of appellant Miers F. Truett, "(twenty-five thousand) 25,000 (two hundred thousand and two hundred) 200,200 parts of the same tract of land."

It thus appears appellants neither owned nor claimed an interest in the entire grant, but only in that portion before described, being the same allotted to Vicente Peralta. Nothing appears to show that appellants or their counsel represent the interests of Domingo, Antonio, or Ignacio Peralta to the remotest degree in the whole or any portion of the grant, and so far as shown they and those claiming under them are and have ever been satisfied with, and have accepted, the benefits of the confirmations and patents.

It was not violative of the statute for the court to declare the external boundaries of the grant and limit the confirmation to the interest shown by the claimants before the court. It was probably the better practice where the claimants before the board or the

court were owners of only a portion of the grant for the court to determine the validity and external boundaries of the same, or the total quantity if afloat, and then confirm only so much as the claimants might have shown themselves entitled, leaving the unrepresented interests to be asserted by the claimants thereof in their own way or have the bar of the statute interposed.

This practice was substantially adopted in the *Cañada de los Capitancellos* grant, which was under review by the Supreme Court three separate times, to wit, in the case of *United States* v. *Fossat* (20 How., 413), (21 How., 446), and the *Fossat* or *Quicksilver Mining* case (2 Wall., 649).

That case was brought originally before the board of commissioners under the act of March 3, 1851, by appellee upon a "claim for three-fourths of a league of land known as a part of the Cañada de los Capitancellos." The original grant was to Justo Larios for a parcel of land having that name, and who sold it in 1845 to a person "from whom the appellee deduced title to an undivided three-fourths interest, and that his share had been set apart to him by a valid conveyance." The Supreme Court held the grant to Larios to be for 1 league of land, and, concluding, said:

> The grant to Larios is for 1 league of land to be taken within the southern, western, and eastern boundaries designated therein and which is to be located, at the election of the grantee or his assigns, under the restrictions established for the location and survey of private land

> claims in California by the Executive Department of this Government. The external boundaries designated in the grant may be declared by the district court from the evidence on file, and such other evidence as may be produced before it, and the claim of an interest equal to three-fourths of the land granted is confirmed to the appellee. (20 How., 413–461.)

If the interest of Fossat in the league had been set apart by partition agreement as the northern three-fourths, what objection would there have been to describing it by particular boundaries and confirming it accordingly, if the court was sufficiently advised thereof?

Such was the course adopted in the case at bar, which violated neither the letter nor the spirit of the act.

The proceedings against which objection by appellants are directed constitute the survey of the northern portion of the grant confirmed to Domingo and Vicente Peralta, for they show no interest in any other.

This survey, after repeated correction under the orders of the district court, was finally approved on August 4, 1871, and upon which the patent to Domingo and Vicente Peralta was issued and accepted to the northern portion of the grant.

The real contention to which brief of appellants goes is that the western boundary of the grant designated as the Bay of San Francisco should have been surveyed to low-tide water line and where an estuary broke the continuity of the line, such as the estuary

called Bay of San Antonio, the line should have been run across its mouth from headland to headland.

The question which the district court *did* adjudicate by the decree approving the survey of 1871 was that the location of the western boundary should be at mean high-water mark on the Bay of San Francisco, and *specially* that the line should be run on the shore line at mean high-water mark in the estuary of the Bay of San Francisco called the Bay of San Antonio. In other words, that the western boundary should be surveyed at high-water mark, as fixed by the Coast Survey, following necessarily the meanderings of this line, thus excluding the estuary called the Bay of San Antonio, situate on the southern side of the city of Oakland.

Without entering into an investigation or discussion of the question as to whether a decree fixing the boundary at a bay or the sea properly carried the line to ordinary high-water mark or to low-water line, or whether the common or civil law rule should prevail, it is sufficient answer in this proceeding to say that the conclusive presumption of the conformity of the approved survey and patent issued thereon, to the decree of confirmation, follows from the decree of the district court approving it, no appeal having been prosecuted to correct errors if any were committed. So long as the patent stands uncanceled, it is full execution and satisfaction of the claim, binds the United States and those claiming under them, and binds the confirmees and those claiming under them.

The present so-called intervenors, Gwin and Truett, are not within the term "third persons," as used in the fifteenth section of the act of 1851.

In *Beard* v. *Federy* (3 Wall., 478), which was quoted approvingly in *Domingues de Guyer* v. *Banning* (167 U. S., 723–741), it was held that:

> The term "third person," as then used, does not embrace all persons other than the United States and the claimants, but only those who hold superior titles, such as will enable them to resist successfully any action of the Government in disposing of the property.

It was further held by Mr. Justice Field in *Moore* v. *Wilkinson* (13 California, 488), and quoted approvingly in the case of *Domingues de Guyer* v. *Banning* (supra, 743–744), that:

> The fifteenth section of the act of Congress of 1851 provides that the final decree of confirmation and patent shall be conclusive between the United States and the claimants only, and shall not affect the interests of third persons. If conclusive between the United States and the claimants, it must be equally so between persons holding under either of those parties.

The survey conforms to decree of confirmation, and has been adjudicated in the proper proceeding which binds these appellants.

In the case of *Miller* v. *Dale* (92 U. S., 473), which was a contest between a claim under a decree of confirmation and approved survey made in execution

thereof and a patent under a decree of confirmation, where the surveys overlapped and conflicted.

In discussing the act of June 14, 1860, Mr. Justice Field for the court said:

> Originally surveys were left entirely to the action of the local surveyor and the Land Department. Great complaints were sometimes made that surveys thus established were unjustly extended in directions so as to include the settlements and improvements of others; and contests over them were in consequence often prolonged for years. To prevent possible abuses in this way, the act of Congress of June 14, 1860, was passed, allowing surveys, when objection was made to their correctness, to be brought before the court and subjected to examination, and requiring them to be corrected if found to vary from the specific directions of the decrees upon which they were founded; or if the decrees contained no specific direc-directions, from the general rules governing such cases. *The approval of the court established the fact that the survey was in conformity with the decree of confirmation;* or if the decree was for quantity only, that the survey was authorized by it; and in either case the approval rendered the survey conclusive as to the location of the land against all floating grants not previously located. The questions then left for controversy before the courts related to the title of the property, the parties proceeding upon the established conformity of their respective surveys with the decrees upon which they were founded.

In the case of *Adam* v. *Norris* (103 U. S., 591), Mr. Justice Miller, referring to the case of *Miller* v. *Dale* (*supra*) and the history of the act of June 14, 1860, says:

> The last of the cases above cited gives the history of the act of June 14, 1860, and holds that the effect of a compliance with the act is limited to the establishment of the conformity of the survey to the decree of confirmation, which fact could not afterwards be disputed by anyone who, under that act, had opportunity to contest it before the district court.

Referring again to the opinion of this court by Mr. Justice Field in the case of *United States* v. *Halleck* (1 Wall., 439), which recognized the application of the act of June 14, 1860, to surveys which had been returned into the district court for its examination in execution of the original decree of confirmation made by the board of land commissioners on April, 1857, said:

> In May following a survey of the tract confirmed was made under the directions of the surveyor-general of California and was approved and transmitted by him to the Commissioner of the General Land Office at Washington for examination and approval preliminary to the issue of a patent. In May, 1858, the Commissioner appears to have approved the survey and to have made preparations to carry the same into a patent, but was overruled by the Secretary of the Interior, who in September following disapproved of the survey and sent the case

back to the surveyor-general. At the subsequent December term of this court, the decision of the case of the *United States* v. *Fossat*, 21 How., 445 (62 U. S., 16, 186), was made, which was supposed by the district court of California to recognize a jurisdiction in that court to supervise all surveys of confirmed claims under Mexican grants. Acting upon this view of the decision, the district court, in November, 1859, ordered the new survey which had been made by the surveyor-general to be returned into the court and gave leave to the claimants to file exceptions to it. The new survey was, accordingly, returned and *exceptions to it were filed by the claimants and purchasers under them;* and proceedings upon the exceptions were pending on the passage of the act of June 14, 1860. Whatever question might be raised as to the jurisdiction of the court to supervise the surveys previous to that act, there can be none since its passage. *The act applies not merely to surveys subsequently made, but also to such surveys as had been previously made and approved by the surveyor-general and returned into the district court upon objections to their correctness.*

The latest case which considers the conclusive effect, upon confirmees and their grantees, of approved surveys and patents issued thereon is that of *Dominguez de Guyer* v. *Banning*. (167 U. S., 732.)

This was an action of ejectment for the possession of Morman Island, situate in the inner Bay of San Pedro, California, claimed by the plaintiff to be within the exterior lines of the bay, and within the exterior lines

of the confirmed tract as described in the decree of confirmation, although excluded by the approved survey and patent issued in conformity thereto. Mr. Justice Harlan, delivering the opinion of the court, said:

> The plaintiffs therefore contend that we have a case in which the survey made in execution of the decree of confirmation under the act of 1851, and the patent based on that survey, except and exclude lands which, although within the exterior lines of the bay, are within the exterior lines of the confirmed tract as described in such decree.
>
> But does it follow that in this action to recover possession plaintiffs can recover lands that were excluded from the survey and are not embraced by the patent based upon that survey? The plaintiffs offered in evidence in support of their title a patent which manifestly did not grant lands that were excluded from the surveyed claim; and yet it is contended that they may go behind both the survey and patent and recover the possession of the lands so excluded, precisely as they could do if the lands had been included in both the survey and patent.
>
> In our opinion, if those who obtained the decree of confirmation objected to the survey as not being in conformity with that decree, their objection should have been made known to the district court before the survey was transmitted to the General Land Office, or at least before it was acted upon and made the basis of a patent. The patent was not issued until nearly a year after the survey was made and certified. Under the act of 1851 it was within

> the power of the district court to have required a survey in exact conformity with its decree. Its jurisdiction over the subject did not end with the decree. The surveyor-general was required by the statute (13) to cause an accurate survey to be made of all private claims finally confirmed under the act of 1851, and to furnish plats of the same. If he misinterpreted the decree, if he made an inaccurate survey, and excluded from it lands that were confirmed to the original claimants, the court had authority to compel the proper execution of its decree (736).

If the district court erred in the attempt to make the surveyed lines conform to the decree of confirmation, the action was subject to review upon appeal to the Supreme Court prior to the passage of the act of July 1, 1864 (13 Stat., 332), and thereafter by appeal to the circuit court of the United States for the district.

This course was not taken by confirmees nor those claiming under them, and they are bound by the patent as a complete and full judicial determination that the approved survey conforms to the decree of confirmation, and all questions adjudicated antecedent to the patent are concluded while the patent stands uncanceled, and as to confirmees and those claiming under them are *res adjudicata*.

It is contended that neither the confirmees nor their grantees ever presented "to the General Land Office an authentic certificate of such confirmation and plat or survey of the said land, duly certified and approved

by the surveyor-general of California," and requested a patent, and hence the authority to issue a patent never vested.

This provision is not jurisdictional, but remedial, furnishing ground for action compulsory in character against the officer in case he does not proceed to carry into effect the decree of the court, after survey has been finally approved, by causing patent to issue to the confirmee.

However, in this instance the survey was approved and patent was issued and accepted by confirmees and their grantees, and enjoyed for over twenty years without protest. The observation of Mr. Justice Harlan in *Dominguez de Guyer* v. *Banning*, *supra* (739), is conclusive of this contention:

> So far from the claimants under the decree of confirmation rendered in 1857 bringing the survey before the district court in order that any error therein might be corrected, they accepted it as filed. We say this because the statute requires a patent to issue to the claimant upon *his* presenting to the General Land Office an authentic certificate of the confirmation *and a plat or survey of said land, duly certified and approved by the surveyor-general of California.* If the claimants under the decree of confirmation did not themselves present the survey to the General Land Office and ask a patent in accordance therewith, they accepted a patent based upon that survey, and plainly showing that it conformed to a survey that did not embrace, for the purpose of a patent, anything within the

exterior lines of the inner Bay of San Pedro. If the Secretary of the Interior, upon inspecting the survey and the decree of confirmation, had authority to order a new survey or to disregard the part of it excluding lands within the exterior lines of the inner bay, the record does not show that any effort was made in the Land Office to bring about such result. On the other hand, if the Land Office had only a ministerial duty to issue a patent in exact accordance with the decree of confirmation, no steps were taken to compel the performance of that duty. We have, therefore, a case brought in 1886 in which the plaintiffs seek to recover the possession of lands alleged to have been confirmed in 1857 to those under whom they claim, but which lands in 1858, nearly thirty years before the commencement of this action, were expressly excluded as well from the survey, to which no objection was urged, as from the patent issued to and accepted by the claimants under that decree. We are of the opinion that while it may be true in some cases that an action to recover possession of lands confirmed to a claimant under the act of 1851 can be maintained before a patent is issued, *yet a patent issued avowedly in execution of such decree was conclusive between the United States and the claimants*, and, until canceled, it alone determines, in an action to recover possession, the location of the lands that passed under the decree. Such is the effect of former decisions of this court.

It is insisted on behalf of the Government that the appellants, Gwin and Truett, by their neglect and

silence, have foreclosed themselves of all right to contest the lack of conformity of the patent to the decree of confirmation, in this or any other form of proceeding.

The decision of Assistant Commissioner Mondell, holding that the "action of the courts upon the surveys of these claims precludes this office from further action" was sound, and the attempt to cloud the title of the entire water front of the city of Oakland, on the Bay of San Antonio, by obtaining a patent upon a survey made in 1895 under the act of July 23, 1866 (14 Stat., 218), was providently arrested, and serious and embarrassing litigation prevented.

It is respectfully submitted that Gwin and Truett have no such standing as will enable them to challenge the conclusive conformity of the patent to the decree of confirmation, which inured to their benefit as the successors in interest, in part, to the land confirmed to Domingo and Vicente Peralta.

JOHN K. RICHARDS,

Solicitor-General.

MATTHEW G. REYNOLDS,

Special Assistant to the Attorney-General.

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